

PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298



March 24, 2003

Agenda ID#1983
Alternate to Agenda ID#1970

TO: PARTIES OF RECORD IN APPLICATION 02-06-024.

Enclosed is the Alternate Draft Decision of Commissioner Brown with the Draft Decision of Administrative Law Judge (ALJ) Ryerson.

When the Commission acts on the draft or alternate decision, it may adopt all or part of it as written, amend or modify it, or set aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Public Utilities Code Section 311(e) requires that an alternate to a draft decision be served on all parties, and be subject to public review and comment prior to a vote of the Commission. Rule 77.6(d) provides that comments on the alternate draft decision be filed at least seven days before the Commission meeting.

Please note that the alternate decision makes one substantive change to the ALJ's draft decision; Issue number 3 of the Final Arbitrator's Report is revised to conform to prior Commission decisions regarding VNXX traffic.

Comments on both the draft and the alternate decisions must be filed and served Monday, March 31, 2003.

Pursuant to Rule 77.3 comments shall not exceed 15 pages. Finally, comments must be served separately on the ALJ and the assigned Commissioner, and for that purpose I suggest hand delivery, overnight mail, or other expeditious method of service.

Angela K. Minkin
Chief Administrative Law Judge

AKM:vfw

Attachment

Agenda ID #1983

Alternate to Agenda ID#1970

4/3/03

Arbitration

Decision **ALTERNATE DRAFT DECISION OF COMMISSIONER BROWN.**

(Mailed 3/24/03)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of Verizon California Inc.
(U-10021-C) Petition for Arbitration with
Pac-West Telecomm, Inc. (U5266-C) Pursuant to
Section 252(b) of the Telecommunications Act of
1996.

Application 02-06-024
(Filed June 12, 2002)

**DECISION APPROVING ARBITRATED AGREEMENT
PURSUANT TO SECTION 252, SUBSECTION (e), OF THE
TELECOMMUNICATIONS ACT OF 1996 (ACT)**

Summary

In this decision we modify and approve the arbitrated interconnection agreement (ICA) filed by on February 18, 2003, Verizon California Inc. (Verizon) and Pac-West Telecomm, Inc. (Pac-West), under Rule 4.2 of our Revised Rules Governing Filings made Pursuant to the Telecommunications Act of 1996 (Rules), pursuant to Subsection 252(e) of the Act. We find that the ICA does not violate the requirements of Section 251 of that Act, the Federal Communications Commission's (FCC) implementing regulations therefore, or the pricing standards set forth in Subsection 252(d) of the Act. However, we do find that the Final Arbitrator's Report finding on Issue 3 of the agreement is inconsistent with Commission policy established in prior interconnection agreement (ICA) cases and therefore Issue 3 of the ICA shall be modified to comport with this decision.

Application (A.) 02-06-024 is closed.

Background and Procedural History

As required by Subsection 252(e)(1) of the Act, in this decision we approve in its entirety the proposed ICA between Verizon and Pac-West, following arbitration of certain issues the parties could not resolve through negotiation. Pac-West's previous ICA with Verizon expired on April 13, 2002.

The history of the dispute, and a complete discussion of the parties and disputed issues, are set forth in detail in the Final Arbitrator's Report (FAR), which was filed on February 10, 2003. Rule 4.2.1 required the parties to file the entire agreement conforming to the FAR, and respective statements concerning approval or rejection of the proposed ICA, within seven days after issuance of the FAR. Both parties timely filed these documents, thus placing before us the task of approving or rejecting the ICA in its current form.¹

Rule 4.2.1 specifies that each party's statement must indicate:

- a. the tests the Commission must use to measure an agreement for approval or rejection,
- b. whether the party believes the agreement passes or fails each test, and
- c. whether or not the agreement should be approved or rejected by the Commission.

An arbitrated ICA may be rejected by this Commission only if it does not meet the requirements of Section 251, implementing regulations prescribed by the FCC, or the pricing standards set forth in Section 252(d). This test is mirrored by our Rule 4.2.3.

¹ No comments were filed by any member of the public within ten days after the filing of the agreement, as permitted under Rule 4.2.1.

Verizon's statement urges us to take a piecemeal approach in adopting the ICA, specifically by rejecting the Arbitrator's resolution of Issues 1, 3, 4, and 7; modifying his resolution of Issues 5, 6, 8 and 18; and drafting replacement contract provisions reflecting his resolution of Issues 19 and 20, because the parties have been unable to do so themselves. Essentially, Verizon's statement reargues its position with respect to all of these issues in an effort to have the Commission overturn the arbitrated outcome on each. This is inappropriate to the task before us, which is to determine whether the ICA as a whole satisfies Section 251 and its implementing regulations, and Section 252(d) of the Act. On the issues cited by Verizon, either party's position appears lawful on its face and satisfies this standard, and we will not be placed in the position of overturning or reworking the Arbitrator's resolution of an issue, or undertaking the parties' job of translating those results into contract language.

Discussion Issue 3

We find that consistent with the outcome in a previous Commission Decision (D.) 99-09-029, and three Commission arbitration decisions based upon that rulemaking, Verizon should receive transport charges from Pac-West for Virtual NXX (VNXX) traffic pending FCC resolution of the issue in the *Intercarrier Compensation NPRM*.²

Issue number 3, as cast by the parties, asks whether Verizon should be allowed to collect transport charges on calls destined to Pac-West customers with disparate rating and routing points. At issue is whether Verizon should, or

² This ICA is approved concurrent with the Commission approval of the ICA between Pac-West and SBC-California. The VNXX issue is the same in both ICAs, although the discussion in the Pac-West and SBC-California case is more detailed.

should not be compensated for the costs to deliver VNXX traffic to Pac-West. VNXX is a form of Foreign Exchange service where the purchaser of the VNXX is not physically located in the originating callers local calling area, yet the originating call to the VNXX is considered local from the caller's perspective. VNXX traffic is interexchange traffic because it terminates outside of the originating calling area (exchange), although it is rated as a local call to the calling party. VNXX and Foreign Exchange differ from traditional local calling where the called NXX and callers NXX resides within the same local calling area.

The nature of the Pac-West's network design requires Verizon to long-haul virtually all calls to Pac-West in order for Pac-West's switch to route the call over its system to its customer. The Commission in deciding prior arbitration agreements concluded that CLECs would be absolved from paying the costs associated with transport from origination to their point of interconnection on the condition that the disparately rated and routed traffic was returned and terminated within the rate area where the local call originated.³ For foreign exchange type of service, where the traffic does not return to the originating rate center, the Commission determined that such traffic would be subject to transport charges.⁴ These policies are clearly elucidated by the Commission in D. 02-06-076;

³ FCC Rule 51.703(b) forbids the ILECs from assessing any charges to transport "local" traffic, which is subject to reciprocal compensation provisions. However, Interexchange traffic is not subject to the Telecommunications Act's reciprocal compensation requirements. The California Commission determined that disparately routed, local calls and VNXX calls are subject to reciprocal compensation, not the FCC.

⁴ See GNAPs Arbitration Decision 02-06-076, pp. 25-30.

The calling areas adopted by the Commission govern whether a call is local or an intraLATA toll call. Any call rated as an intraLATA toll call under the Commission's established calling areas would constitute exchange access traffic, not local traffic. (p.20)

"(W)e have no intention of making a decision in an arbitration proceeding that would have the net result of abolishing intraLATA calling. For calls that are intraLATA in nature, e.g., those beyond 16 miles, traditional access charges will apply." (p.24)

Additionally, the Commission's local compensation rules require the originating call carrier to compensate the CLEC for terminating the "local" traffic, including VNXX traffic that is disparately rated and routed, as in a foreign exchange (FX) service.

Decision 02-06-076, page 28, states;

"...VNXX calls would be intraLATA calls, not local calls, if tied to the rate center that serves the customer. By allowing disparate rating and routing, we are allowing for those calls to become local calls, and as such, subject to reciprocal compensation. However, GNAPs is required to pay the additional transport required to get those calls where they will be considered local calls. ...This is similar to the concept of the ILEC's tariffed FX service, in which the customer pays for the privilege of receiving dialtone from a different exchange. Because these calls would be intraLATA toll calls, if they were rated out of the rate center, which actually provides service to the customer, they are not subject to the provisions of Rule 703(b)."

The rationale supporting the premise of the ILEC not having to pay for transport for disparately rated and routed "local calls" was based on a quid pro quo that the CLEC bears the cost of returning the traffic from its point of interconnection to the local calling rate center. This "quid pro quo" policy promotes local competition and improves the opportunity for CLECs to utilize

one point of interconnection to serve each of the rate centers within the LATA. Thus, CLECs have to balance the investment cost of adding a point of interconnection with the cost of purchased transport, leased or otherwise, from their switching facilities to the end user.

Verizon cannot differentiate the traffic it hands off to Pac-West that is destined for the originating rate center (local NXX) from interexchange traffic destined 16 miles away from the originating rate center (VNXX). However, Pac-West knows to where it terminates the traffic it receives from Verizon. It is irrelevant whether the traffic Pac-West terminates to its customer is a voice call, or is handed off to the Internet or a private network. The rate area associated with where Pac-West delivers traffic to its customer is the relevant "termination point" for transport rating purposes. Since Pac-West knows to where it terminates traffic for its customers, Pac-West is capable of identifying the amount of traffic that is returned to the originating rate center (local NXX), and the amount of traffic it terminates which is interexchange - more than 16 miles away from the originating rate center (VNXX).⁵

We do not agree with the Arbitrator that customer location is *immaterial* because Verizon must hand off all traffic to a Pac-West POI. Clearly, uncompensated costs are borne by the originating network provider and Pac-West's claim that a cost differential between VNXX and local NXX calls must be found is a red herring. Regardless of whether the traffic's eventual destination is the originating local NXX calling area or a VNXX destination, or an interLATA toll destination, the transport cost between Verizon and Pac-West are the same.

⁵ The ICA includes non-disclosure agreements necessary to protect confidential/proprietary information.

Yet, the FAR would only allow Verizon compensation for interexchange toll calls, but not interexchange VNXX calls. We overturn the result reached by the Arbitrator on this issue, because contrary to the FAR, there is no need for Verizon to explain whether its cost of transporting traffic to Pac-West will differ based on where Pac-West delivers it. The Commission in a prior arbitration decision already addressed this issue. Decision 01-02-045, states;

"D.99-09-029 granted Level 3 the right to assign routing and rating points and provide Virtual NXX service, so long as Pacific is fairly compensated. Pacific showed that it has uncompensated costs when carrying calls for Level 3's Virtual NXX customers. Therefore, Level 3 must compensate Pacific for the use of Pacific's facilities regardless of whether or not Pacific incurs additional costs when transporting Level 3's Virtual NXX traffic.

The prior arbitration decisions reflect a consistent Commission application of the principle of cost causation. The principle would be violated if the Commission allowed competitors to avoid paying for transport over another carrier's network in order to long haul interexchange traffic terminated in disparate rate centers. To allow such long-haul transport without transport compensation would be unfair for the ILEC, which bears the cost of its transport network. Further, such a policy in regards to VNXX, once widely adopted by the CLEC industry would potentially result in a shift in the cost of such transport to local exchange subscribers rather than to the subscribers of VNXX service which is the beneficiary of the foreign exchange like service.⁶

⁶ Pac-West argues that transport charges are paid by the originating call, telephone subscriber. This may be true to a very limited extent that local exchange costs include interexchange costs within the local calling area. However, transport costs outside the

Footnote continued on next page

Pac-West has developed its VNXX product largely to serve its ISP customers, a substantial part of its business. VNXX is a valuable service that subscribers are willing to pay a premium for. Such service rates should bear the costs associated with provisioning the service. Verizon offers a similar product as foreign exchange service. The FAR would have Verizon provide transport services for non-local VNXX traffic without charge to its competitors while bearing the full cost of transport for provisioning its own foreign exchange service. CLECs are free to compete utilizing wholesale services of the ILEC, other CLEC transport providers, or to provision transport services themselves.

The policies of this Commission and the Telecom Act precisely intends for carriers to invest in facilities based on the innovation incentives inherent in an openly competitive market. We refrain from creating an incentive that distorts marketplace investments by requiring incumbents to either subsidize its competitors' or shift costs to local exchange customers for inter-exchange traffic that is destined beyond the origination rate center. Such policy would encourage CLECs to become providers of termination facilities, to collect reciprocal compensation and thereby avoid investment in multiple points of interconnection, switching, and transport, and result in less network redundancy than facilities based competition economics would otherwise dictate. The competitive challenge is both on the CLECs and ILECs to invest wisely in origination and termination facilities.

local calling area are excluded. Potentially, ILECs could assign these unrecovered transport costs to local calling in any proceeding addressing local exchange costs.

Discussion Issues 2 and 17(a)

Pac-West's statement indicates its belief that the conformed ICA satisfies the rejection standard, with the exception of provisions reflecting two issues, 2 and 17(a), that were decided by the Arbitrator in the FAR. Regarding Issue 2, Pac-West is concerned that Verizon might construe the FAR to impose the FCC's reduced rate caps on presumptively ISP-bound traffic retroactively from the effective date of the new ICS. We agree with Pac-West that Paragraph 82 of the FCC's *ISP Remand Order*⁷ expressly proscribes such a result,⁸ and may not be reflected in the ICA.

Regarding Issue 17(a), we also agree with Pac-West that a requirement for Pac-West to pay any allocated portion of costs on Verizon's side of the carriers' point of interconnection does not satisfy the interconnection requirements of Section 251 of the Act, and therefore must not be included in the ICA.

We have examined the conformed agreement filed by the parties, and have determined that approval should be granted, subject to the foregoing discussion. The pricing provisions comply with the standards for interconnection and network element charges, as well as the charges for transport and termination of traffic, under Section 252(d). The ICA does not discriminate against nonparties,

⁷ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic* CC Docket Nos. 96-98 and 99-68, *Order on Remand and Report and Order*, 17 FCC Rcd 9151 (2001).

⁸ "The interim compensation regime we establish here applies as carriers renegotiate expired or expiring interconnection agreements. *It does not alter existing contractual obligations, except to the extent that parties are entitled to invoke contractual change-of-law provisions.*" (*Italics supplied.*) D.02-01-062 determined that the change-of-law provision in the existing ICA excludes FCC orders, and any change to the terms of the existing ICA requires a written amendment by both parties.

and is consistent with the public interest, convenience and necessity, and thus comports with Section 252 (e)(2)(A). It also satisfies the requirements of Section 251 and the FCC's implementing rules, and thereby satisfies Section 252(e)(2)(B). Lastly, the agreement satisfies our own regulatory requirements.

Rule 4.2.4 requires a decision approving or rejecting an arbitrated ICA to contain written findings.⁹ Consistent with this rule, we include findings in support of our order.

Assignment of Proceeding

Geoffrey F. Brown is the Assigned Commissioner and Victor D. Ryerson is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. The Interconnection Agreement under Sections 251 and 252 of the Telecommunications Act of 1996 by and between Verizon California Inc. and Pac-West Telecomm, Inc. (ICA), filed by the parties on February 18, 2003, pursuant to Rule 4.2.1, conforms to the Final Arbitrator's Report in this proceeding, except for the modification required to reflect the resolution of Issue 17(a).
2. The pricing provisions of the ICA comply with the standards for interconnection and network element charges, and the charges for transport and termination of traffic, under Section 252(d) of the Act.
3. The ICA does not discriminate against nonparties, and is consistent with the public interest, convenience and necessity, and thus comports with Section 252 (e)(2)(A) of the Act.

⁹ Section 252(e)(1) of the Act only requires us to include written findings as to any deficiencies in the ICA.

4. The ICA, with the indicated modification of the outcome under Issue 17(a), satisfies the requirements of Section 251 of the Act and the FCC's implementing rules, and thereby satisfies Section 252(e)(2)(B).

5. The ICA satisfies the Commission's regulatory requirements, as reflected in its rules, decisions, and orders.

Conclusion of Law

The Commission should approve the modified ICA.

O R D E R

IT IS ORDERED that:

1. The Interconnection Agreement under Sections 251 and 252 of the Telecommunications Act of 1996 by and between Verizon California Inc. and Pac-West Telecomm, Inc., filed by the parties on February 18, 2003, is approved, subject to the modifications indicated in the body of our decision.

2. Application 02-06-024 is closed.

This order is effective today.

Dated _____, at San Francisco, California.

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Draft Decision of Commissioner Brown on all parties of record in this proceeding or their attorneys of record.

Dated March 24, 2003, at San Francisco, California.

/s/ VANA WHITE

Vana White

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.